No. 96-1925

In the Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR, INC., PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Section 302(c)(1) of the Labor Management Relations Act, 1947, 29 U.S.C. 186(c)(1), permits an employer to agree, as part of a collective bargaining agreement, to pay an employee or former employee for time spent handling grievance matters for other employees when that individual is considered to be on a leave of absence by virtue of his election to be the plant's full-time grievance chairman.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

Section 302(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 186(a), generally prohibits an employer from paying, or agreeing to pay, any money or thing of value to any representative of his employees, any union, or any union officer. 29 U.S.C. 186(a)(1)-(2). Section 302(c)(1), 29 U.S.C. 186(c)(1), makes an exception to that prohibition for payments made as compensation for, or by reason of, an employee's service as an employee of the employer. The issue in this case is whether Section 302(c)(1) permits an employer to agree, as part of a collective bargaining agreement, to pay an employee or former employee for time spent handling grievance mat-

ters for other employees at the employer's plant, when that individual is considered to be on a leave of absence by virtue of having been elected the full-time grievance chairman at the plant. Willful violations of Section 302 constitute criminal offenses, 29 U.S.C. 186(d)(2), and federal district courts may restrain violations of Section 302, 29 U.S.C. 186(e). The proper interpretation of Section 302 also bears on the Department of Labor's administration of public reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 432(a)(6), 433(a)(1). The United States filed a brief as amicus curiae in the court of appeals.

STATEMENT

1. Petitioner Caterpillar, Inc., is engaged in the manufacture, sale, and distribution of heavy equipment at plants throughout the United States. Since 1954, Caterpillar and the respondent unions (collectively "UAW") have been parties to a series of collective bargaining agreements covering Caterpillar employees, including employees at Caterpillar's plant in York, Pennsylvania. Pet. App. 4a, 49a. The parties' agreements have always contained detailed procedures for handling employee grievances satisfactorily and in an expedient manner, with the union serving as the advocate for employees involved in the disputes. The agreements also have always contained a "no-docking" provision, that is, a provision allowing employees who are also union representatives, such as stewards and grievance committeemen, to leave their jobs to handle grievance-related matters for other employees "without loss of pay and while maintaining their status as full-time Caterpillar employees." *Id.* at 50a, *id.* at 4a; J.A. 44. Under the most recent agreement, approximately 108 stewards (one per foreman) and nine committeemen (three for each of the three shifts) are

granted such leave at the York plant to handle grievance matters on a part-time basis. J.A. 5-6, 43, 44.

Since 1973, the parties' agreements have recognized the grievance committee chairman as a full-time position and have considered chairmen to be on a leave of absence from Caterpillar. J.A. 58. Under the agreement, Caterpillar pays a chairman for his regular shift hours, at his regular hourly rate, adjusted for general increases and cost of living. J.A. 14-15.[1] The chairman also retains his insurance, pension, and unemployment benefits, as well as his seniority status as an employee. J.A. 15. The chairman has a right to return to active duty work when he leaves the chairman position and, under the collective bargaining agreement, Caterpillar must "promptly return to work an employee who is able to return from leave of absence." J.A. 35. At the York plant, such full-time leaves of absences are authorized for two individuals, a grievance committee chairman and an alternate chairman. J.A. 14-15; Pet. App. 50a.[2]

The grievance chairman, like the stewards and committeemen, is elected by the employees in the bargaining unit. To be eligible for election, a candidate must be an employee in the bargaining unit. J.A. 6. The responsibilities of the grievance chairman include: investigating and/or handling second, third, and final step grievances; participating in joint investigations; consulting with certain union officials about disposition of denied grievances; and taking part in certain other joint labor-management

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[1] The parties agreed that Caterpillar would pay six additional hours in a workweek (equivalent to four hours' overtime at time-and-one-half pay) when the chairman spends eight or more hours that week handling grievance matters. J.A. 61.

[2] The alternate acts in the place of the absent chairman or an absent committeeman and assists the chairman in his regular duties. J.A. 43. Like the courts and parties below, we refer to the chairman and the alternate collectively as the chairman.

activities mutually agreed upon, such as informal discussions and meetings to try to resolve issues before a formal grievance is filed. J.A. 13-15. The grievance chairman also performs some union work that the collective bargaining agreement does not treat as related to grievance matters. Caterpillar does not pay him for time spent on such work. Pet. App. 57a.[3] Caterpillar also provides unpaid leave to other employees to attend union meetings and to meet with company representatives and provides temporary leaves of absences for employees to attend union conferences. J.A. 37.

The term of office for the grievance chairman is three years. C.A. App. 646. During the period at issue in this case, the grievance chairman at the York plant was a Caterpillar employee who had been first elected to the position in 1990. Respondents' evidence indicated that, at that time, the chairman had more than 21 years of service with Caterpillar, including part-time committeeman work for nine years. J.A. 54, 82-83.

2. a. In November 1991, the parties' most recent collective bargaining agreement expired. The UAW and several locals began a strike, and Caterpillar locked out employees at certain plants. In April 1992, the UAW recessed the strike. The employees returned to work under the terms of the implemented proposal of Caterpillar, which included the substance of the grievance process described above. Pet. App. 76a.

On October 30, 1992, Caterpillar informed the UAW by letter that, "effective November 16, 1992, and continuing until a new agreement is reached," it would unilaterally cease paying wages and providing insurance coverage to

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[3] Specifically, Caterpillar does not pay the grievance chairman for time spent in "(i) negotiations, (ii) vacations, (iii) attendance at meetings and/or conventions not held in the Local Union office, or (iv) any activity not directly related to the functions of his office." J.A. 14.

the various grievance chairmen. J.A. 49; Pet. App. 50a. A Caterpillar official later explained that the letter was an effort to "put economic pressure on the Union" and to support Caterpillar's bargaining position. C.A. App. 144, 162. The letter also stated that "stewards and part-time committeemen employed by the Company who are responsible for processing grievances for our employees on an as-needed basis during the workday, will continue to be paid by the Company without any docking of pay for time properly spent in grievance administration." J.A. 49.

b. On November 17, 1992, the UAW filed an unfair labor practice charge with the National Labor Relations Board (NLRB). The charge alleged that Caterpillar, by unilaterally stopping its previous practice of paying wages and benefits to certain employees who are elected by the union membership to handle grievances full time, had refused to bargain in good faith, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5). Pet. App. 4a, 50a-51a, 73a. After learning that the NLRB's General Counsel intended to file a complaint if settlement was not imminent, Caterpillar filed the instant action against the UAW seeking a declaration that Caterpillar's "payment of wages and benefits to the Union's full-time Committeemen would violate § 302(1) [sic] of the LMRA, [and] directing [respondents] not to require Caterpillar to make such payments to its full-time Committeemen." C.A. App. 87-88; Pet. App. 51a.

The district court stayed its proceedings pending the NLRB proceeding. On January 31, 1995, the NLRB administrative law judge (ALJ) recommended dismissal of the complaints against Caterpillar. Pet. App. 72a-86a. The ALJ concluded that the payments are facially discriminatory, in violation of Section 8(a)(3) and (b)(2) of the NLRA, 29 U.S.C. 158(a)(3) and (b)(2). The ALJ did

not reach Caterpillar's defense that the payments violated Section 302 of the LMRA. Pet. App. 82a. The General Counsel appealed, and the NLRB has not yet ruled on the ALJ's recommendation.

3. After issuance of the ALJ's ruling, the district court lifted its stay and granted summary judgment to Caterpillar. Pet. App. 49a-65a. The court determined that the payments to the grievance chairman would be unlawful under Section 302(a) of the LMRA unless authorized under the exception set forth in Section 302(c)(1). See Pet. App. 53a-54a. The district court ruled that, under *Trailways Lines, Inc.* v. *Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932 (1986), the payments are not covered by the Section 302(c)(1) exception. The court found that the grievance chairman and alternate are former, not "current and active," Caterpillar employees, because Caterpillar did not exercise sufficient control over them (Pet. App. 56a-59a) and because they were not performing services for the benefit of Caterpillar (*id.* at 59a-60a). The court then concluded that the wages paid the chairman "are not for services rendered while he was an employee of Caterpillar." *Id.* at 61a.

The district court noted that respondents had argued that the invalidation of the payments would not further the goals of Section 302 and that the payments of the sort at issue in this case "are commonplace today and have been so for many years." Pet. App. 62a n.16. The court acknowledged that the purpose of Section 302 was "to 'prevent bribery, extortion, shakedowns, and other corrupt practices,'" and that its decision "could have far reaching effects on not just these parties, but on other employer/labor union relationships." *Ibid.* The court

ruled, however, that, under *Trailways*, "the proposed payments are unlawful." *Ibid.*[4]

4. The en banc court of appeals reversed by a 9-3 vote. Pet. App. 1a-44a. The court accepted the conclusion that, under *Trailways*, grievance chairmen are not current employees and that wages to them are "not in compensation for their past services rendered as production employees." *Id.* at 8a. The court overruled *Trailways*, however, to the extent that its analysis required the conclusion that the payments to grievance chairmen are not "by reason of" their prior service as employees of Caterpillar. Instead, the court held that such payments *are* "by reason of" that service and are therefore protected under Section 302(c)(1). *Ibid.*

The court held that the *Trailways* panel had erred in interpreting the "by reason of" provision to exempt "only those payments for past services actually rendered while the former employee was still employed by the company." Pet. App. 8a. The court explained that, under that approach, even the "no-docking" provision for part-time grievance handling found in many collective bargaining agreements, including the instant parties' contract, would fail to satisfy Section 302(c)(1). The employer's payment of regular hourly wages to union members who are called away from production work to handle grievances is payment for services not actually rendered to the employer, the court stated, yet "no-docking arrangements have been consistently upheld by

[4] The district court rejected the UAW's contention that Caterpillar's claim is moot, concluding that, although there is no current contract between the parties, the parties are negotiating a new contract and "this issue is, undoubtedly, part of that process and is not moot." Pet. App. 54a n.7. The court also ruled that Caterpillar's claim was not barred by a six-month statute of limitations or the doctrine of laches because the complaint did not seek redress for past payments, but sought a declaration that future payments would be unlawful under Section 302. *Ibid.*

the courts as not in violation of § 302." *Id.* at 9a (citing cases). The court added that "it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible, while granting a single employee eight hours per day of that same leave is a federal crime." *Id.* at 9a-10a.

The court concluded that the payments at issue here are "by reason of" the employees' past service for Caterpillar because the payments arose out of the collective bargaining agreement that contains the terms of workers' employment. In the court's view, whether a payment is owed because of service as an employee depends on the terms of the contract. Pet. App. 10a-11a. The court emphasized that a collective bargaining agreement "does not immunize otherwise unlawful subjects but, by defining the basis for the payments, speaks directly to the question posed by the statute as to whether the payments are 'compensation for, or by reason of[,] * * * service as an employee.'" *Id.* at 11a-12a. The court also concluded that "no-docking" provisions could not be persuasively distinguished from the payments at issue here. *Id.* at 12a. Finally, the court noted that the payments in this case do not pose the kind of harm that Congress contemplated when it enacted the LMRA, such as "bribery, extortion, and other corrupt practices conducted in secret." *Ibid.* It concluded that, "[w]ithout explicit statutory direction from Congress, we cannot condemn these payments as criminal." *Ibid.*

Judge Mansmann filed a dissenting opinion in which she argued that the language of Section 302(c)(1) does not encompass the payments at issue here, and that the legislative history and purpose of Section 302 support that conclusion. Pet. App. 12a-30a (Mansmann J., joined by Greenberg, J., dissenting). Judge Alito filed a separate dissent, noting that the payments at issue differ from the corrupt practices usually at issue in Section 302

prosecutions and stating that he was "not certain that the Congress that enacted Section 302 would have chosen to outlaw such payments if it had focused specifically on that question." *Id.* at 30a. He nevertheless concluded that they are prohibited by the language of Section 302. *Ibid.*

SUMMARY OF ARGUMENT

Section 302(a) of the Labor Management Relations Act, 1947 (LMRA) generally prohibits an employer from paying, or agreeing to make payments to, any representative of its employees. Section 302(c)(1) makes an exception to that prohibition for payments to a representative of the employer's employees or a union officer who is also an employee or former employee of the employer "as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1). The payments to the grievance chairman at issue in this case fit within that exception because they are made "by reason of" the chairman's service as an employee of Caterpillar.

Whether a payment is "by reason of" an individual's service as an employee requires an inquiry into the relationship between the service and the payments. An employer's agreement to make a payment to an employee or former employee as part of a collective bargaining agreement normally gives rise to a presumption of validity under Section 302(c)(1), because such a bargaining agreement generally defines the compensation and other benefits to which employees are entitled by virtue of their service. Payments made under a collective bargaining agreement to union representatives who are also employees or former employees of the employer are not, however, per se lawful. Rather, a payment that is ostensibly made by reason of service is unlawful if that reason is a sham, or a corrupt effort to hide a bribe or improperly influence a union official.

The payments at issue here meet the "by reason of" requirement of the statute. The grievance chairman would not be entitled to receive the payments from Caterpillar but for his service as a Caterpillar employee; only an employee may be elected to the position as grievance chairman. And the justification and context of the agreement to make the payments confirm that they are by reason of that service with Caterpillar.

The circumstances surrounding enactment of the LMRA support the conclusion that Section 302(c)(1) permits the payments at issue here. There is no evidence of a congressional intent to prohibit collective bargaining arrangements enabling employees to leave service on a plant floor, without sacrificing pay and other benefits, in order to assume full-time grievance handling responsibilities. Indeed, such arrangements are substantially similar to no-docking provisions in collective bargaining agreements, under which shop stewards may leave their work on the plant floor to process employee grievances without losing pay, and with which Congress was quite familiar and approved. To declare all such arrangements to be unlawful would disrupt longstanding and common patterns of dealing that have formed an integral part of the administration of collective bargaining agreements. Permitting the payments at issue, in contrast, would promote a goal of the LMRA to provide orderly and peaceful procedures for resolution of labor-management disputes.

ARGUMENT

THE PAYMENTS IN THIS CASE ARE LAWFUL UNDER SECTION 302(c)(1) OF THE LMRA

Section 302(a) of the LMRA, 29 U.S.C. 186(a), generally prohibits the payment of, or agreement to pay, "any money or other thing of value" to "any representative of any of [an employer's] employees," or to any "labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer." 29 U.S.C. 186(a)(1) and (2). Section 302(b) provides a counterpart prohibition making it unlawful for any person to receive "any money or other thing of value" prohibited by Section 302(a). 29 U.S.C. 186(b). Those prohibitions are qualified by the nine exceptions listed in Section 302(c).[5] The first of these, Section 302(c)(1), exempts "any money or thing of value payable by an employer * * * to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1).

This case deals with the common and longstanding practice in certain industries of continuing the pay and benefits of an employee who, pursuant to a collective bargaining agreement, handles grievance matters for employees at a plant on a full-time basis and is considered to be on a leave of absence. Where such payments are proportionate to the employee's prior service, are made

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[5] The Section 302(c) exceptions to the Section 302(a) and (b) prohibitions are recognized as defenses to criminal prosecution, and the government must disprove those defenses if (but only if) the defendant meets his burden of production and some facts supporting the exception have been admitted into evidence. *United States* v. *Donovan*, 339 F.2d 404, 409-410 (7th Cir. 1964), cert. denied, 380 U.S. 975 (1965).

to a person who is not engaged principally in union business other than contract administration, and are not a sham or a corrupt effort to conceal bribes or other improper inducements, Section 302(c)(1) permits such payments as being "by reason of" the employee's prior service to the employer. The contrary conclusion urged by petitioner—that such payments are per se illegal—would call into question the legality of provisions in collective bargaining agreements that are and have long been in widespread use.

A. The Payments Are "By Reason Of" The Grievance Chairman's Service As An Employee

1. Section 302 responded to congressional concern "with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted). The class of prohibited payments is broad. See 29 U.S.C. 186(a). Recognizing the legitimacy of certain payments made to union representatives who are also employees or former employees, however, Congress provided an exception in Section 302(c)(1) to permit the payment to a union representative of "money or thing of value * * * as compensation for, *or* by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1) (emphasis added). According to basic canons of statutory construction, phrases connected in the disjunctive are given separate meanings. *Garcia* v. *United States*, 469 U.S. 70, 73 (1984). A plain reading of the first phrase, "as compensation for," permits the giving of money or things of value to a union official as remuneration earned by hours worked in service as an employee. The second phrase, "by reason of," permits something

else—noncompensatory payments, *i.e.*, the giving of money or things of value on account of, and because of, the union official's service as an employee.[6]

Petitioner would limit Section 302(c)(1) to "payments * * * for past services actually rendered," the validity of which turns on the relationship of such payments to "the value of the actual services rendered." Pet. Br. 23, 24. Petitioner's interpretation reads "by reason of" out of Section 302(c)(1). Payments that are directly related to the value of the actual services rendered fall within the standard definition of "compensation." See *Black's*

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[6] As the district court noted (Pet. App. 55a n.10), it is not necessary to determine whether the grievance chairman and the alternate are "employees" or "former employees" of Caterpillar. All agree that they are one or the other, and Section 302(c)(1)'s exception applies to both. Nonetheless, the district court concluded (*id.* at 56a), and the court of appeals apparently agreed (*id.* at 7a), that the chairman and alternate are former employees, not current employees. In that connection, the court of appeals noted that the chairman and alternate perform no services for Caterpillar and are not under the company's control. *Id.* at 7a.

That analysis does not give proper weight to the fact that the chairman and alternate have not severed their ties with Caterpillar, but are considered to be on leaves of absence. The term "employee," as used in Section 302 of the LMRA, has the same meaning as under the NLRA, see 29 U.S.C. 142(3), 152(3). Under the NLRA, "[t]here is a presumption that an employee granted a leave of absence is still an employee." *Valley Rock Prods., Inc.* v. *NLRB*, 590 F.2d 300, 303 (9th Cir. 1979) (employee who was self-employed while on leave of absence presumed still to be an employee); see also *Allied Chem. Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) (although retirees not considered "employees" under NLRA because they have ceased all work with no expectation of return, governing agreement that covered employees under the NLRA if they work "on hourly rates of pay * * * may include persons on temporary or limited absence from work, such as employees on military duty"). Employment by the union does not foreclose the grievance chairman from also being an employee of Caterpillar. *NLRB* v. *Town & Country Elec., Inc.*, 116 S. Ct. 450, 455 (1995). Although the presumption of continuing employee status for an employee on leave of absence would be subject to rebuttal, no such rebuttal has been made here. In any event, the resolution of the current-versus-former employee issue need not affect the outcome of this case.

Law Dictionary 283 (6th ed. 1990) ("giving an equivalent or substitute of equal value"); *The Random House Dictionary of the English Language* 417 (2d ed. 1987) (def. 3: "something given or received as an equivalent for services, debt, loss, * * * etc.").

In an effort to give meaning to the "by reason of" provision, petitioner suggests (Br. 21-22) that the term "compensation" is limited to wages, thus permitting "by reason of" to be read to apply to fringe benefits. Restricting "compensation" in that manner, however, ignores the meaning of compensation in other legal contexts, where fringe benefits are viewed as an integral part of compensation. See, *e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 808 (1989) (retirement benefits are deferred compensation); *Foster* v. *Dravo Corp.*, 420 U.S. 92, 99-100 (1975) (vacation benefits held to be deferred compensation "for work actually performed"); *Bingler* v. *Johnson*, 394 U.S. 741 (1969) (employer-funded educational leave of absence is taxable compensation); *United States* v. *Carter*, 353 U.S. 210, 217-218 (1957) (surety obligated to make contributions to health and welfare fund under a collective bargaining agreement as part of compensation for "work done"); see also 26 C.F.R. 1.61-21(a)(3) ("A fringe benefit provided in connection with the performance of services shall be considered to have been provided as compensation for such services."). The "by reason of" clause, therefore, cannot be restricted to payments that are readily understood as covered by the "compensation" clause.

2. a. Whether payments, such as the payments to the York plant grievance chairman at issue in this case, are "by reason of * * * his service as an employee" of Caterpillar requires an inquiry into the causation between the service as an employee and the payments. "Because of" is the most common meaning of "by reason of." *Black's Law Dictionary*, *supra*, at 201; *Random House*

Dictionary, *supra*, at 1608 ("reason" def. 9: "by reason of, on account of; because of: *He was consulted about the problem by reason of his long experience.*").

The degree of causation required under a statute using the "by reason of" construction is informed by the context. "By reason of" can mean simply "but for" causation. *Holmes* v. *SIPC*, 503 U.S. 258, 265-266 (1992). In the context of civil RICO and Clayton Act suits for treble damages, however, the Court has interpreted the phrase to require a greater showing of causation, *i.e.*, that connoted by the common law requirement of "proximate cause." *Id.* at 268 ("by reason of" under RICO requires proof of "proximate cause"); *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 533-536 (1983) (same, under Clayton Act).[7] In the context of Section 302(c)(1), "by reason of" similarly requires more than that the payment would not be made "but for" the recipient's status as an employee; it demands that the payments reflect a connection not simply to the status of being an employee or a former employee, but to one's "service" as an employee.

In the employment context, "service" generally is "[t]he act of serving the labor performed or the duties required" under a contract. *Black's Law Dictionary*, *supra*, at 1368. Consistent with that premise, courts have stated that "[o]ne obvious instance in which continuing

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[7] By the same token, under Section 303(b) of the LMRA, 29 U.S.C. 187(b), suit may be brought by "[w]hoever shall be injured in his business or property *by reason o[f]* any violation of [Section 303(a)]" (emphasis added), which prohibits certain unfair labor practices by a labor organization, 29 U.S.C. 187(a). The First Circuit, following the Ninth Circuit, has interpreted "by reason of" in that context to require "conduct [that] 'materially contributes' to the injury or is a 'substantial factor' in bringing it about." *Tresca Bros. Sand & Gravel, Inc.*, v. *Truck Drivers Union, Local 170*, 19 F.3d 63, 65 (1st Cir. 1994) (quoting *Mead* v. *Retail Clerks Int'l Ass'n*, 523 F.2d 1371, 1376 (9th Cir. 1975)).

payments constitute recompense for past services is when those continuing payments were bargained for and formed part of a collective bargaining agreement." *Toth* v. *USX Corp.*, 883 F.2d 1297, 1304 (7th Cir.) (indicating that provision for continued pension credit to union members on full-time leave could be covered under Section 302(c)(1) exception if it were part of a collective bargaining agreement), cert. denied, 493 U.S. 994 (1989); see also *Communications Workers* v. *Bell Atl. Network Servs., Inc.*, 670 F. Supp. 416, 422 (D.D.C. 1987) (upholding legality under Section 302(c)(1) of collective bargaining agreement provisions (in effect for decades) that continue pension accrual, death benefits, and insurance based on last job with employer when employee is on leave of absence for union work); *National Fuel Gas Distrib. Corp.*, 308 N.L.R.B. 841, 844 (1992) (ruling that employer engaged in unfair labor practice by unilaterally ceasing compliance with collective bargaining agreement that provided continuation of retirement plan service credit and thrift plan eligibility for employees who had served or were serving as union officials on full-time leave of absence). By defining the nature of the service necessary to receive payments, a collective bargaining agreement speaks directly to the question posed by Section 302(c)(1). Accordingly, in ordinary circumstances, the parties' provision for a payment to an employee or former employee in a collective bargaining agreement suggests that the payment was "by reason of * * * service as an employee."

The Department of Labor has long treated inclusion in a collective bargaining agreement as significant in determining whether payments come within the Section 302(c)(1) exception. As part of its administration of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq.*, the Department must make such determinations to identify payments subject

to reporting requirements under 29 U.S.C. 432(a)(6) and 433(a)(1). Those provisions generally require officers and employees of labor organizations, as well as employers, to report all payments from an employer to union officers and employees. They except, however, "payments of the kind referred to" in Section 302(c). The Department's instructions to officers and employees of labor organizations state that no payments or benefits need to be reported which are

> received as a bonafide employee of the employer for past or present services * * * for periods in which such employee engaged in activities other than productive work, if the payments for such period of time are: (a) required by * * * a bona fide collective bargaining agreement, or (b) made pursuant to a custom or practice under such a collective bargaining agreement * * *.

U.S. Dep't of Labor, Office of Labor-Management Standards, Instructions for Preparing the Labor Organization Officer and Employee Report, Form LM-30, Item 5 (1986).

b. Inclusion in a collective bargaining agreement, however, does not end the inquiry into the lawfulness of payments, for that would amount to little more than a "but for" test.[8] The provision for payments in a collective bargaining agreement does not guarantee that the provision is not a sham or otherwise impermissible. Accordingly, there will generally need to be an additional inquiry to ensure that the payments are being made "by

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[8] Of course, if the collective bargaining agreement provided for payments to *any* union grievance handler, regardless of service or former service as an employee of the employer, the payments would not even meet a "but for" causation test, and therefore could not qualify as payments "by reason of" the service of an employee or former employee.

reason of" the employee's (or former employee's) prior service, rather than "by reason of" something else.[9]

In this case, the type of payments that Caterpillar agreed to make supports the conclusion that they are "by reason of" the services as an employee.[10] Caterpillar agreed to pay the wages and benefits of a full-time grievance chairman who has been elected from his bargaining unit. But for his service as an employee, the grievance chairman would not receive the payments at issue; Caterpillar does not make similar payments to union officials who perform similar functions but who are not employees or former employees of Caterpillar. Cf. J.A. 6, 46-47 (international union representative may assist in grievance process, but no provision for payment to him by

[9] That does not mean that payments cannot be "by reason of" more than one thing. Here, for example, the chairman must be a present or former Caterpillar employee, elected from the bargaining unit; the payments are thus "by reason of" his service as an employee. To earn the payments, however, he must perform grievance handling work. In that sense, the payments are also "by reason of" that work. Section 302(c)(1) does not state, however, that the service as the employee must be the "sole" or "major" cause of the payment, as Judge Alito contends. See Pet. App. 38a, 40a. In cases where the causal connection appears as attenuated as in Judge Alito's hypotheticals (*id.* at 35a), the inquiry to ensure that a payment was made "by reason of" the employee's service to an employer would necessarily consider whether service was merely a pretext and whether the payment was a sham or otherwise impermissible. See *Arroyo*, 359 U.S. at 424 ("Both [the employer and the union official] would be guilty if the payment were ostensibly made for one of the lawful purposes specified in § 302(c) if both knew that such a purpose was merely a sham.").

[10] The government's amended brief in the court of appeals suggested that the district court's grant of summary judgment be reversed and the case remanded for examination of the legality of the payments in light of the parties' collective bargaining agreement and other relevant facts bearing on their relationship. Gov't C.A. Br. 29. In this Court, Caterpillar has not requested the alternative relief of a remand for further consideration of the evidence, and we construe that position as indicative that, on remand, Caterpillar would not adduce any additional evidence to suggest that the payments at issue were illegal.

Caterpillar). The parties agreed to the payments as part of their collective bargaining agreement. Caterpillar has introduced no evidence that the payments were a sham to procure improper influence over the chairman.

Moreover, the grievance chairman's prior service is directly relevant to the nature of the leave and benefits he is afforded. Because of his service as an employee, the grievance chairman brings experience and understanding to the grievance process that would generally give him an advantage over a person without such service. The grievance chairman is already aware of the conditions in the workplace and the history of labor-management relations there, and he is elected by his fellow employees. Here, the chairman also had served previously as a part-time committeeman for approximately nine years. J.A. 82. Thus, it is reasonable to infer that a person so situated would be more efficient and successful in resolving grievances than a union representative without such service would be.

It is also reasonable to infer that, by virtue of those advantages, an employer would have an incentive to preserve an employee's wage, benefits, and seniority during a leave of absence to perform full-time grievance handling. Timely and efficient handling of grievances benefits not only the employee and the union, but also the employer. See, *e.g.*, *Douglas* v. *Argo-Tech Corp.*, 113 F.3d 67, 72 (6th Cir. 1997); *In re International Harvester Co.*, 1 War Labor Rep. 112, 122 (1942); U.S. Dep't of Labor, Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business* 1 (1980) (one reason why employer would grant paid time, or leave, to an employee engaged in handling grievances is because "employer participates in and derives a benefit from * * * prompt settlement of grievances"); U.S. Dep't of Labor, Bureau of Labor Statistics, *Collective Bargaining Clauses: Company Pay for*

Time Spent on Union Business 2 (1959); cf. *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 528 & n.5 (1949) (upholding agreement retaining union chairmen over returning veterans with statutory right to reemployment, because of role of chairmen and importance of grievance adjustments). A person who has gained experience as an employee in the bargaining unit would likely provide extra value to the grievance-resolution process, particularly where the individual may concentrate on that process full time, without disruption to normal plant operations.[11]

For those reasons, payments to a full-time grievance chairman are different from payments to a union official who does not handle grievances or otherwise administer the contract. The NLRB and several circuits have upheld labor agreements that extend preferences (with respect to layoffs and job recall) to union officials who handle grievance and other contract administration, but have declined to uphold such preferences for other union officials. The NLRB has explained that "it is well established" that providing extra seniority for stewards and others administering the contract for the purpose of layoff and recall

> is proper even though it, too, can be described as tying to some extent an on-the-job benefit to union status. The lawfulness of such restricted super

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[11] Those efficiencies may be particularly significant in this case. Respondents' evidence indicates that, before the establishment of the full-time grievance chairman, grievance chairmen, "[i]n practice, * * * often were spending full time doing their grievance-related work with little or no time left for their regular plant jobs." J.A. 59-60; but see C.A. App. 463-464 (Caterpillar disagreeing with UAW's explanation). In such circumstances, having an employee work full time on grievances is likely to be less disruptive to production than having employees "repeatedly pulled off and on the job," including some for entire days at a time. See J.A. 60.

> seniority is, however, based on the ground that it furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job.

Dairylea Cooperative Inc., 219 N.L.R.B. 656, 658-659 (1975) (distinguishing permissible superseniority to protect steward from layoff, from impermissible superseniority to obtain more lucrative job assignment, etc., for same steward, because latter disadvantaged other employees who were not active in union), enforced *sub nom. NLRB* v. *Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162 (2d Cir. 1976). By contrast, the NLRB has invalidated such superseniority where the beneficiary is not a steward or otherwise involved in on-the-job grievance processing or other contract administration responsibilities. *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), enforced *sum nom. Local 900, Int'l Union of Elec. Workers* v. *NLRB*, 727 F.2d 1184 (D.C. Cir. 1984). See also *NLRB* v. *Local 1131*, 777 F.2d 1131 (6th Cir. 1985) (rule that union official can qualify for preference in layoff and recall only if he must be on the job to perform duties directly related to administering collective bargaining agreement was reasonable); *NLRB* v. *Wayne Transportation*, 776 F.2d 745 (7th Cir. 1985) (same); *NLRB* v. *Ensign Elec. Div. of Harvey Hubble, Inc.*, 767 F.2d 1100 (1985) (same), on reh'g on other grounds, 783 F.2d 1121 (4th Cir.), cert. denied, 479 U.S. 984 (1986); *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d 143 (2d Cir. 1984) (same); cf. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (employee entitled to have union representative present at investigatory interview that might result in disciplinary action); Letter from Administrator, Wage and Hour Division, U.S. Dept. of Labor, to Edward T. O'Hara (Apr. 6, 1949) (interpreting Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to

impose primary responsibility on employer to pay employees for time spent doing grievance work, and distinguishing payments for internal union work for which employer is not responsible).

Finally, the payments at issue here are proportionate to the benefits the chairman received when he was performing services to Caterpillar. Indeed, his seniority and benefits continue to accrue as though he were still performing such services, and his wages are commensurate with the level at which he was last paid by Caterpillar for his service on the plant floor. Continuation of the same wage and benefits payments by the employer gives an incentive to an employee to serve as a grievance committee chairman, by ensuring the employee that he will not suffer adverse consequences or compromise the status and benefits he has developed at Caterpillar, as a result of serving as the chairman. This confirms that the arrangement does not unduly compensate the chairman in his capacity as a union representative.

B. The Payments In This Case Are Analogous To Common "No-Docking" Arrangements

The payments to the full-time grievance chairman here strongly resemble the "no-docking" payments made to part-time committeemen. "Under a no-docking clause, the employer agrees that shop stewards may leave their assigned work areas for portions of a day to process employee grievances without loss of pay." Pet. App. 9a. Such payment by the employer to production workers for hours when they are not performing their regular duties may be payment "for services not actually rendered for it, since those employees are already receiving their regular hourly wages and benefits for their production line work." *Ibid*. As the court of appeals noted (*ibid.*), the NLRB and lower courts have consistently approved no-docking arrangements as encompassed within

the exception set forth in Section 302(c)(1).[12] The NLRB also has held that a union's request for a no-docking provision is a subject over which the employer must bargain in good faith and may not unilaterally alter without prior bargaining with the union.[13] A holding that the payments in this case are unlawful under Section 302(c)(1)

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[12] See, *e.g.*, *NLRB* v. *BASF Wyandotte Corp.*, 798 F.2d 849, 855-856 (5th Cir. 1986), enforcing *BASF Wyandotte Corp.*, 274 N.L.R.B. 978, 979 (1985) (noting that interpreting Section 302 to prohibit "paid time for stewards to discuss grievances with employees would be inimical to the statutory goal of encouraging cooperative labor relations"); *BASF Wyandotte Corp.* v. *Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1053-1054 (2d Cir. 1986); *Herrera* v. *International Union, UAW*, 73 F.3d 1056, 1057 (10th Cir. 1996), aff'g *Herrera* v. *International Union, UAW*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *IBEW Local 2154* v. *National Fuel Gas Distrib. Corp.*, 16 Employee Benefits Cas. (BNA) 2018 (W.D.N.Y. 1993); *International Union, UAW* v. *CTS Corp.*, 783 F. Supp. 390, 394-395 (N.D. Ind. 1992); *Communications Workers*, 670 F. Supp. at 422; *United States* v. *Motzell*, 199 F. Supp. 192, 194, 198 (D.N.J. 1961); see also *Sunnen Prods., Inc.*, 189 N.L.R.B. 826, 828 (1971) (receipt of regular wages by employee representatives for time spent in meetings about grievances and work conditions "not at all unusual where affiliated unions are involved and are not inherently coercive" because it serves "to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case"); *In re International Harvester Co.*, 1 War Labor Rep. at 122 (ordering inclusion in collective bargaining agreement of provision that "[u]nion representatives who are employees of the Company shall not lose pay during the time spent in handling grievances within the plant," noting that ruling is "solely in recognition of the practice in this regard among many plants making products similar to those manufactured by the International Harvester Company," and indicating that the prompt handling of grievances benefits employer); *In re Caterpillar Tractor Co.*, 2 War Labor Rep. 75, 95 (1942) ("practice of paying union representatives while they are handling grievances is very common in industry," and grievance adjustment "is business in which the union and the company are equally interested").

[13] See, *e.g.*, *Arizona Portland Cement Co.*, 302 N.L.R.B. 36, 44 (1991), a ruling with which two courts of appeals have agreed, *Axelson, Inc.* v. *NLRB*, 599 F.2d 91 (5th Cir. 1979); *Midstate Tel. Corp.* v. *NLRB*, 706 F.2d 401 (2d Cir. 1983).

would call into question those no-docking provisions for part-time grievance handling, thus destabilizing patterns of bargaining and settled legal standards.[14]

Petitioner concedes (Br. 39), as it must in light of its current practices, that it would be "appropriate to recognize a limited 'no docking' exception" for part-time grievance handlers. Petitioner notes (*ibid.*) that Section 8(a)(2) of the NLRA expressly exempts from that section's prohibition on employer payments to unions the practice of permitting "employees to confer with [their employer] during working hours without loss of time or pay." 29 U.S.C. 158(a)(2). In light of that statute, petitioner acknowledges that Section 302(c)(1) should be construed to permit agreements to pay for such time. Petitioner maintains, however, that the exception should apply only to no-docking provisions involving regular employees representing other employees on an as-needed basis during the workday, and not to full-time committee chairmen.

Petitioner's basis for distinguishing part-time no-docking arrangements from the payments at issue here is unpersuasive. "The distinction between using part of the day for union business and taking leaves of absence to become full-time union officials is only one of degree: the

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[14] Moreover, the Department of Labor, Administrator of the Wage and Hour Division, has long treated payment of employees and employee members of a grievance committee for time spent at grievance conferences during regular working hours to be mandated under the FLSA and subject to minimum wage and overtime restrictions. *Wage and Hour Manual* (BNA) 45:79-45:80, 45:291 (1948). As a matter of enforcement policy, where a union is involved, the counting of the hours is left to the collective bargaining process or custom thereunder, but the employer bears the ultimate responsibility for the payment. 29 C.F.R. 785.42; Letter from Administrator, *supra*. The 1947 enactment of the LMRA did not alter the Administrator's position because he viewed payments of employee representatives for time spent in grievance proceedings to be consistent with Section 8(a)(2) of the NLRA and Section 302 of the LMRA. *Wage and Hour Manual* (BNA) 45:291 (1948).

nature of the absences and the payments made by the employer during them * * * is the same." *Trailways Lines, Inc.* v. *Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101, 111 (3d Cir.) (Becker, J., dissenting), cert. denied, 479 U.S. 932 (1986). Like a steward or a part-time committeeman, a full-time committee chairman gives up production work for the employer for a period of time and takes a contractual leave of absence to handle grievances, yet is typically paid at customary production rates. Also, like the part-time committeemen and stewards, the grievance chairman is entitled to return to service for the employer when the grievance chairman leaves that position.

Contrary to petitioner's characterization of the payment to the grievance chairman as a "*massive wage-docking* policy" (Br. 31), that payment does not reduce the wages to other members of the bargaining unit—any more than do the payments for part-time leaves to stewards and committeemen for grievance handling. In both instances, the employer may have to pay another employee to perform production work that the individual handling the grievance otherwise would have performed. See J.A. 59. Caterpillar pays the grievance chairman only for the handling of grievance-related matters, not general union business.

In short, there is no justification for having the legality of paid absences to handle grievances turn on whether an employee does so on a part-time or full-time basis. The agreement of employer and union to take advantage of the efficiencies in granting one employee a leave of absence to handle grievance matters for eight hours a day should not be treated differently than a decision to have four employees each devote two hours to grievance handling each day. Pet. App. 10a. In either case, the payments are "by reason of" the recipient's service as an employee.

C. The History And Purpose Of Section 302(c)(1) Support The Court Of Appeals' Ruling

When Congress enacted the LMRA in 1947, it was well aware that "[e]mployers generally * * * allow representatives of the union, without losing pay, to confer not only with the employer but as well with employees, and to transact other union business in the plant." H.R. Rep. No. 245, 80th Cong., 1st Sess. 28-29 (1947). At that time, "approximately 40% of all industrial collective bargaining agreements" contained some type of no-docking provision. *BASF Wyandotte Corp.* v. *Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050 (2d Cir. 1986) (citing *Basic Patterns in Collective Bargaining Contracts* 15:127 (BNA ed. 1948)). The legislative history does not indicate that Congress intended that Section 302 outlaw them. See generally Resp. Br. 27-42.

Section 302 was enacted primarily to regulate welfare funds and to preclude corrupt activities such as bribery and extortion. See *United States* v. *Ryan*, 350 U.S. 299, 304-305 (1956); *Arroyo*, 359 U.S. at 425-426 & nn.6-8; 93 Cong. Rec. 4677-4680 (1947); *id.* at 4678 (statement of Sen. Ball). The provision was introduced as an amendment on the Senate floor and, during that debate, there was only one mention of Section 302(c)(1), without any analysis or discussion. *Id.* at 4678. After adoption by the Senate, *id.* at 4745-4754, the matter was sent to a conference committee which recommended, *inter alia*, that Section 302 be included in the House legislation without changes to the relevant provisions as adopted by the Senate. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66-67 (1947). The conference report's discussion of Section 302 did not focus on subsection (c)(1), and there appears to be no mention of no-docking provisions being covered by Section 302.

Thus, as the Second Circuit concluded after an exhaustive examination of the legislative history, "the more

reasonable inference from Congress's failure to mention no-docking provisions in connection with § 302 is that Congress did not intend § 302(a) to outlaw such provisions." *BASF Wyandotte*, 791 F.2d at 1051; see also *NLRB* v. *BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.5 (5th Cir. 1986).[15] In the absence of any clear intent of Congress to exclude payments such as those at issue here from the Section 302(c)(1) exception, the Court should decline to interpret the statute in such a manner.

D. The Policy Of The LMRA Would Be Furthered By Application Of Section 302 To Permit The Payments At Issue Here

One of the LMRA's central purposes is "to provide orderly and peaceful procedures" for preventing either labor or management from interfering with the rights of the other. 29 U.S.C. 141(b); see also 29 U.S.C. 151 (policy of "encouraging practices fundamental to the friendly adjustment of industrial disputes"). A major factor in achieving industrial peace is a collectively bargained procedure for resolving grievances. *United Steelworkers* v.

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[15] Moreover, as the Second Circuit found, there is "fairly plain indication in Congress's treatment of other sections" of the House bill "that Congress considered no-docking provisions to be legitimate practices to be encouraged" and "that both branches of Congress" envisioned an increase in no-docking provisions. *BASF Wyandotte*, 791 F.2d at 1051, 1053; *id.* at 1051-1053 (discussing House bill that would have permitted employers to treat independent unions like national unions—including, under now-Section 8(a)(2), "allow[ing] shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant"—and House Conference Report that explained that Senate version "adequately dealt with" those matters) (quoting H.R. Conf. Rep. No. 510, *supra*, at 40). See also *NLRB* v. *BASF Wyandotte Corp.*, 798 F.2d at 855-856 & n.5 (Fifth Circuit adopting same analysis as Second Circuit). Subsequent amendments to Section 302 are "consistent with the view that Congress did not intend that section to be read as prohibiting no-docking provisions." *BASF Wyandotte*, 791 F.2d at 1053 (citing legislative materials).

Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (in labor relations, "arbitration is the substitute for industrial strife"). Prohibiting collectively bargained payments to employees or former employees for their time spent participating in the grievance process could seriously undermine the effectiveness of that process. Such payments help ensure that grievances are brought to the employer's attention and efficiently resolved with the participation of the employee and the union representative, while minimizing the disruption to the workplace.

Criminalizing the payments at issue here could lead to invalidation of numerous existing collectively bargained arrangements.[16] The Department of Labor has found some type of "no-docking" provision in a substantial percentage of collective bargaining agreements. See *Major Collective Bargaining Agreements*, *supra*, at 1, 6 (examination of nearly all private agreements covering 1,000 workers or more revealed that 45% granted employee union representatives pay for some types of grievance work and that such provisions applied to more than 80% of agreements involving certain industries and unions); see also *id.* at 10; *Collective Bargaining Clauses*, *supra*, at 1-2. The Department of Labor has also long recognized the importance of such agreements in its enforcement of the LMRDA and the FLSA. See pp. 16-17, 24, *supra*. The Department of Justice has not criminally prosecuted cases involving continuation of pay or benefits during grievance work, absent a corrupt execution of the

[16] The record reflects the existence over the past several decades of collectively bargained agreements to pay full-time committeemen by major corporations, *e.g.*, by Ford (1941-42, 1993-96); by General Motors (1941, 1993-96); by Chrysler (1943-45, 1993-96); by John Deere (1971, 1995-97); by International Harvester (now Navistar) (1971); and by J.I. Case (1977-83, 1995-98). J.A. 57, 58, 63-64. Under petitioner's approach, all of those corporations were engaged in practices that are criminal violations of Section 302(a).

contract, or an arrangement that was a sham. Cf. *United States* v. *Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994) ("company officials ignore[d] the * * * collective bargaining agreement with a union and secretly grant[ed] retroactive leaves of absence, and thus pension benefits, [solely] to a small number of the union's officials (and those officials ignore[d] union policy and accept[ed] the benefits)"), cert. denied, 514 U.S. 1003, opinion amended to correct clerical errors, 59 F.3d 1095 (11th Cir. 1995); *United States* v. *Kaye*, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977). As noted above, the NLRB and lower courts have consistently approved no-docking arrangements. Such longstanding governmental interpretation and practice, known to Congress and not altered despite various amendments to Section 302, should be accorded some weight in considering the validity of the practice at issue. See, *e.g.*, *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915); see also *United States* v. *Enmons*, 410 U.S. 396, 410 (1973) ("It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting [a statute], its action would have so long passed unobserved.").

Finally, petitioner's contention that approval of the payments at issue in this case would pose a serious risk to healthy labor-management relations is belied by experience in other labor-management circumstances. In 1978, when Congress passed the Civil Service Reform Act covering federal-sector employment, it authorized the type of payments alleged to be unlawful here. Section 701(d) of that Act provides, with exceptions not relevant here, that:

> (1) any employee representing an exclusive representative, or

> (2) in connection with any other matter covered by this chapter [which includes the representation of employees in grievance procedures], any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. 7131(d). Accordingly, in the public sector the parties would be permitted to agree to treat as official time the full-time representation of employees by full-time union representatives, if "reasonable, necessary, and in the public interest." See *American Fed. of Gov't Employees* v. *FLRA*, 798 F.2d 1525 (D.C. Cir. 1986); see also *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 107 n.17 (1983) (noting that federal employee unions "may presumably negotiate" for travel and per diem expenses for union negotiators "as they do in the private sector"). Pay arrangements are apparently commonplace at the state level as well. See *Major Collective Bargaining Agreements, supra*, at 44-45. There is no reason for deeming the same type of payments to be unlawful in the private sector.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. 186, as amended, provides:

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with

intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or

personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational

activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs:

Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services

by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor

shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

2. Section 8 of the National Labor Relations Act, 29 U.S.C. 158, as amended, provides in relevant part:

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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